

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

REY REY PRODUCE SFO, INC., a ) No. C-05-4710 SC  
California corporation, )  
Plaintiff, ) ORDER GRANTING  
v. ) PLAINTIFF'S MOTION  
JOSE L. AYAR, an individual doing ) FOR ENTRY OF DEFAULT  
business as JALISCO PRODUCE, ) JUDGMENT  
Defendant. )

## I. INTRODUCTION

Plaintiff Rey Rey Produce SFO Inc. ("Plaintiff") brought this action against Jose Ayar ("Defendant"), alleging causes of action for, inter alia, breach of contract and for violations of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a, et seq. Because Defendant, even though properly served with a summons and the Complaint, did not respond to the Complaint, the Clerk of the Court entered default against him.

Presently before the Court is Plaintiff's motion for entry of default judgment. For the reasons stated herein, the Court GRANTS Plaintiff's motion for entry of default and AWARDS Plaintiff \$8,129.50.

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1       **II. BACKGROUND**

2           Plaintiff, a seller and shipper of agricultural commodities  
3       in the wholesale market, sold and shipped perishable agricultural  
4       commodities at the cost of \$9,725.45 to Defendant at his request,  
5       and sent invoices ("Invoices") detailing the amounts. See  
6       Declaration of Manuel Reynoso in Support of Motion for Entry of  
7       Default Judgment ("Reynoso Decl.") ¶¶ 7, 10. After Defendant  
8       failed to pay, Plaintiff brought this action alleging causes of  
9       action for (1) breach of contract; (2) enforcement of statutory  
10      trust provisions of the Perishable Agricultural Commodities Act,  
11      7 U.S.C. § 499a et seq.; (3) violation of the Perishable  
12      Agricultural Commodities Act; and (4) declaratory relief. See  
13      Complaint ("Compl.") at 7-8. After Plaintiff filed the Complaint,  
14      Defendant made some payments, reducing the amount owed to  
15      \$6,226.95. See Reynoso Decl. ¶ 14.

16           Plaintiff asserts that Defendant, who is not an infant or an  
17       incompetent person, was properly served with a summons and the  
18       Complaint, has not filed any response. See Plaintiff's Motion for  
19       Entry of Default Judgment ("Pl's. Mtn.") ¶ 1. The Clerk of the  
20       Court entered default against Defendant on January 10, 2006.  
21       Plaintiff filed the present motion on May 30, 2006.

22           Plaintiff contends that he is owed a total of \$8,129.50.  
23       This amount is the sum of \$6,226.95 for the original order of  
24       perishable goods, \$923.96 in pre-judgment finance charges at 18%  
25       per annum, and \$978.59 for attorney's fees. See Reynoso Decl.  
26       ¶ 16. Plaintiff contends that the rate of post-judgment interest  
27       should be 18%.

### **III. DISCUSSION**

"The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true." Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977). Therefore, for purposes of this Motion, the Court accepts as true the facts as portrayed in the Complaint.

"However, entry of default does not automatically entitle the non-defaulting party to entry of a default judgment regardless of the fact that the effect of entry of a default is to deem allegations admitted." In re Villegas, 132 B.R. 742, 746 (9th Cir. 1991). Rather, "the decision to enter a default judgment is discretionary." Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988).

Among the factors which a trial court is to consider when exercising its discretion as to entry of a default judgment are the "merits of plaintiff's substantive claim" and the "sufficiency of the complaint." Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

The Court will now examine the merits of the case. Plaintiff submitted copies of the Invoices as Exhibits. At the bottom of each Invoice, the following statement appears:

The perishable Agriculture [sic] commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. [sic] 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received. ALL ADJUSTMENTS AND SHORTAGES MUST BE CLAIMED WITHIN 24 HOURS.

TERMS: PACA A [sic] SERVICE CHARGE OF 1 ½% AT THE ANNUAL PERCENTAGE RATE OF 18% WILL BE CHARGED ON ALL ACCOUNTS NOT PAID WITHIN THIRTY DAYS. BUYER AGREES TO PAY REASONABLE ATTORNEY'S FEES IF COLLECTION IN [sic] NECESSARY.<sup>1</sup>

This statement is clear and binds the recipient to an agreement to pay, if necessary, a service charge and reasonable attorney's fees. The Court has no record of Defendant's objections to this agreement, either when the Invoices were sent or after he received a copy of the Complaint. Because Plaintiff submitted sufficient and uncontested evidence to support his claims, the Court has no doubt as to the merits of Plaintiff's substantive claims.

Having settled that, the entry of default judgment in the matter at hand is appropriate provided that the Complaint is sufficient as a matter of law.

A. Breach of Contract

In California, the elements for a cause of action for breach of contract are: (1) the existence of a contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach and (4) damages resulting to plaintiff because of the breach.

See Armstrong Petroleum Corporation v. Tri-Valley Oil and Gas Company, 116 Cal. App. 4th 1375, 1391, FN 6 (Cal. Ct. App. 2004).

Plaintiff has pled a claim for relief. As alleged in the Complaint, the Invoices constitute contracts, Plaintiff completed performance by delivering the goods, Defendant has breached by failing to pay for the goods, and Plaintiff has been damaged by Defendant's failure to pay for the goods.

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<sup>1</sup> This wording is required by 7 U.S.C. § 499e(c)(4) in order to preserve the benefits of the trust created by a PACA transaction.

1           B. Enforcement of Statutory Trust Provisions of PACA

2           Under 7 U.S.C. § 499e(c)(2), "commission merchant, dealer or  
3 brokers" must hold the "receivables and proceeds" from the sale of  
4 the received agricultural products "in trust for the benefit of  
5 all unpaid suppliers or sellers of such commodities or agents  
6 involved in the transaction, until full payment...has been  
7 received." Unpaid sellers "shall lose the benefits of such trust"  
8 unless they provide written notice of their intent to preserve the  
9 benefits of the trust to the merchant or dealer. 7 U.S.C.  
10 § 499e(c)(3). One such method is to provide notice through  
11 invoices or bills which have verbatim the language quoted above.

12           Based on the foregoing, the Court finds that Plaintiff has  
13 stated a claim for relief. Specifically, Plaintiff has provided  
14 Defendant with notice as required by statute.

15           C. Violation of Perishable Agricultural Commodities Act

16           The Court finds that Plaintiff has stated a cause of action  
17 under PACA by alleging that Defendant should have and has not held  
18 in trust the proceeds from the sales.

19           D. Declaratory Relief

20           Plaintiff seeks an order from the Court declaring that  
21 Plaintiff's trust claims are superior to any other claims  
22 Defendant might assert to its accounts receivable to the extent  
23 that the accounts receivable "constitute the corpus of the PACA  
24 trust funds to which Plaintiff is the beneficiary." Compl. ¶ 26.  
25 Plaintiff also seeks an order from the Court declaring that the  
26 trust funds never became property of Defendant under 11 U.S.C.  
27 § 541, that Plaintiff's claim takes priority over Defendant's

1 secured and unsecured claims, and that only funds in excess of the  
2 trust funds necessary to pay the trust claims are property of  
3 Defendant or the estate of the Defendant. See Compl. ¶ 27.

4 The Court can grant only that relief that the law allows.  
5 Through a PACA trust, the "sellers of the commodities maintain a  
6 right to recover against the purchasers superior to all creditors,  
7 including secured creditors." Boulder Fruit Express et al. v.  
8 Transportation Factoring, Inc., 251 F.3d 1268, 1270 (9th Cir.  
9 2001).

10 Based on this, the Court declares that, under PACA,  
11 Plaintiff's trust claims are superior to those of all creditors,  
12 including secured creditors.

13 Because this Order places Plaintiff's claim first on the list  
14 of creditors, both secured and unsecured, the Court finds it  
15 unnecessary to issue an order declaring the other rights Plaintiff  
16 has asked the Court to uphold.<sup>2</sup>

17 **IV. CONCLUSION**

18 The Court GRANTS Plaintiff's motion for the entry of default  
19 judgment. As a consequence, the Court AWARDS Plaintiff a total of  
20 \$8,129.50. This amount is the sum of \$6,226.95 for the original  
21 order of perishable goods, \$923.96 in pre-judgment finance charges  
22 at 18% per annum, and \$978.59 for attorney's fees. The rate of  
23 post-judgment interest is 18%.

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25 <sup>2</sup> The claim under 11 U.S.C. § 541 is premature because no  
bankruptcy petition, either voluntary or involuntary, has been  
26 filed. Also, the Court cannot find authority in a (possibly  
mistakenly cited) statute entitled "7 U.S.C. § (b)(4) and 7" to  
issue an order declaring what Plaintiff has asked the Court to do.  
27

1           The Court also DECLARES that Plaintiff's PACA trust claim is  
2 superior to the claims of other creditors, both secured and  
3 unsecured.

4           IT IS SO ORDERED.

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6           Dated: July 7, 2006

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8           \_\_\_\_\_  
9           UNITED STATES DISTRICT JUDGE